PD-0703-20

IN THE
COURT OF CRIMINAL APPEALS

The State of Texas,

Petitioner,

v.

Jessie Lee Brooks, Jr,

Respondent

PETITION FOR DISCRETIONARY REVIEW

Appeal from the Third Court of Appeals, Cause No. 03-18-00759-CR, and the 20th Judicial District Court, Milam County, Texas Trial Court Cause No. CR 25,688, Honorable John Youngblood

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IDENTITY OF PARTIES AND COUNSEL

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STATEMENT OF THE CASE

Defendant was indicted for Assault Impeding Breath of a Family Member and Aggravated Assault with a Deadly Weapon. The State proceeded with the two cases under separate cause numbers. C.R. Vol. 1 P. 5. A jury acquitted defendant of Assault Impeding Breath of a Family Member, but found defendant guilty of Aggravated Assault with a Deadly Weapon. R.R. Vol. 5 P. 139. Defendant was sentenced to thirty years confinement in TDCJ Institutional Division by the Trial Court. C.R. Vol. 1 P. 118. Defendant appealed the conviction to the Third Court of Appeals.

The Third Court of Appeals considered the appeal and ruled that a non-verbal threat would constitute a "distinguishable discrete act" that would separately violate the assault statute and therefore, even though not an element of the offense, the hypothetically correct jury charge requires proof of a verbal threat. Slip Op. at 11. The Court of Appeals then determined that there was legally insufficient evidence to uphold the conviction because there was insufficient evidence to show the threat was verbal. Slip Op. at 11. The Third Court of Appeals further found that the judgment could not be reformed to a lesser included charge. Slip Op. at 17. Due to these findings the Third Court of Appeals declined to determine the constitutionality of the court costs. Slip Op. at 17.

It is from this ruling that petitioner seeks review from this Court.

STATEMENT OF PROCEDURAL HISTORY

The Third Court of Appeals filed an order reversing the trial court and rendering acquittal on July 3, 2020. No motion for rehearing was filed.

STATEMENT REGARDING ORAL ARGUMENT

State believes oral argument would be helpful to expound on the case law addressing the issue presented.

GROUND FOR REVIEW

I. When the State includes a deadly-weapon allegation in its aggravated assault by threat indictment and then fails to prove its manner and means of the threat, can the State still prove assault by threat based on use or exhibition of the deadly weapon?

ARGUMENT AND AUTHORITIES

I. Background

The victim in this case lived with the Defendant in a house in Cameron. R.R. Vol. 4 P. 57. On the date of the incident, the Defendant locked the victim out of that house. R.R. Vol. 4 P. 57. After defendant initially locked the victim out of the house, the Defendant confronted victim when she attempted to enter the house. R.R. Vol. 4 P. 57. During this confrontation, Defendant first grabbed the victim's neck and then started hitting the victim with a board. R.R. Vol. 4 P. 57. The victim told the defendant he was hurting her, to which defendant responded that the victim "needed to hit", and continued to hit her across her fingers with a board until they started to bleed. R.R. Vol. 4 P. 57. The victim then went to the emergency room in Rockdale, Texas to treat her injuries. R.R. Vol. 4 P. 58. The victim stated she drove to the Rockdale Hospital to be safe from him after the incident. R.R. Vol. 4 P. 166. The treating physician noted that the victim had injuries consistent with her description of the incident. R.R. Vol. 4 P. 131-32. The following day the victim filed a written statement with the Milam County Sheriff's Office. R.R. Vol. 4 P. 57.

II. Under the Standard Set in *Gollihar v. State*, the Appellate Court Erred in Determining the Evidence Proved a Distinguishable Discrete Act From That Alleged in the Indictment.

A. Standard of Review

This Court has held that the standard provided in *Jackson v. Virginia* is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under the *Jackson v. Virginia* standard, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginina*, 443 U.S. 307, 319 (1979)(emphasis in original).

However, under *Gollihar v. State*, the State does not need to prove an unnecessary allegation. *Gollihar v. State*, 46 S.W.3d 243, 256-57 (Tex. Crim. App. 2001). *Gollihar* overturned prior precedent in *Burrell v. State* that had required any descriptive matter included in the indictment by proven as alleged, even though needlessly stated. *Burrell v. State*, 526 S.W.2d 799, 802 (Tex. Crim. App. 1975). The reason behind this change was to clear up inconsistencies between differing lines of cases and become consistent with the current law, so as to be in line with *Jackson* and federal constitutional requirements. *Gollihar v. State*, 46 S.W.3d at 256-57.

The *Gollihar* rule has been further clarified to show that variances between allegations in the charging instrument and proof at trial can be classified into three categories. *Johnson v. State*, 364 S.W.3d 292, 298-99 (Tex. Crim. App. 2012). These categories are (1) a variance involving statutory language that defines the offense, (2) a

variance involving a non-statutory allegation that describes an allowable unit of prosecution element of the offense, or (3) other immaterial non-statutory allegations. *Id.* Variances of the first type are always material and render evidence legally insufficient, variances of the third type are never sufficiently material to render the evidence legally insufficient, while variances of the second type may render the evidence insufficient only if the variance is material. *Id.*

B. The Court of Appeals Misidentified the Category of Variance as Describing an Allowable Unit of Prosecution.

The Court of Appeals determined the variance here was between a verbal and non-verbal threat, and as such was a non-statutory description of an allowable unit of prosecution element of the offense. Slip Op P. 11. However, this misapplies precedent defining "unit of prosecution." Absent an explicit statement that 'the allowable unit of prosecution shall be such and such,' the best indicator of legislative intent regarding the unit of prosecution is the gravamen or focus of the offense. *Jones v. State*, 323 S.W.3d 885, 889 (Tex. Crim. App. 2010). The assault statute establishes separate and distinct assaultive crimes, with the gravamen of the offense of aggravated assault being determined by the specific type of assault that underlies the aggravating factors. *Landrian v. State*, 268 S.W.3d 532, 536-37 (Tex. Crim. App. 2008).

Here, the underlying type of specific assault is assault by threat. The offense is indeed conduct-oriented, focusing upon the act of making a threat, regardless of any result that threat might cause. *Id.* at 536. But a threat need not be verbal; a person may

communicate a threat by action as well as conduct. *McGowan v. State*, 664 S.W.2d 355, 347 (Tex. Crim. App. 1984); *Donoho v. State*, 39 S.W.3d 324, 329 (Tex. App.–Fort Worth 2001, pet. ref'd). The display of a deadly weapon itself constitutes a threat of the required imminent harm. *Robinson v. State*, 596 S.W.2d 130, 133 n.7 (Tex. Crim. App. 1980). Indeed, under Penal Code section 22.02, assault by threat is aggravated when the defendant "uses or exhibits a deadly weapon during the commission of the assault." Penal Code § 22.02 (a)(2). The timing requirement of Penal Code section 22.02 (a)(2), that the use or display be during the commission of the assault, means the use or display of the deadly weapon necessarily factually subsumes any other threat alleged. In other words, this time element means that the use or display of the deadly weapon is always or nearly always will be part of the same unit of prosecution.

In this case, the aggravating condition was the use of the 2X4 as a part of the threat. Therefore, the Trial Court was correct in finding that the phrase "by telling her that he was going to end her life" was superfluous as it was subsumed entirely by the use of the 2X4 in threatening the victim. *See* R.R. Vol. 5 pp. 56. Essentially, the unit of prosecution of this type of offense is the threat using or exhibiting the deadly weapon. Therefore the Court of Appeals erred in finding this variance described an allowable unit of the offense, rather than being some other immaterial non-statutory allegation.

C. Even When A Variance Involving a Non-Statutory Allegation That Describes an Allowable Unit of Prosecution Does Not Render Evidence Insufficient Unless the Variance is Material.

The Court of Appeals determined the variance here was between a verbal and non-verbal threat, and as such was a non-statutory description of an allowable unit of prosecution element of the offense. Slip Op P. 11. Even with such a variance, under the *Johnson* standard, the evidence still must not be rendered as legally insufficient unless the variance is material. *Johnson*, 364 S.W.3d at 298-99. Here, the Court of Appeals erred in concluding, without analysis, that a material variance exists simply because they determined it was in the second category. Slip Op. p. 12.

A "material variance" occurs when the variance prejudices a defendant's substantial rights. *Ramjattansingh v. State*, 548 S.W.3d 540, 547 (Tex. Crim. App. 2018). This happens when the indictment, as written, 1) fails to adequately inform the defendant of the charge against him, or 2) subjects the defendant to the risk of being prosecuted later for the same crime. *Id.* The Court has determined that the bottom line is, in a sufficiency review, variances are tolerated as long as they are not so great that the proof at trial "shows an entirely different offense" than what was alleged in the charging instrument. *Id.* (Quoting *Johnson* 364 S.W. 3d at 295). Here, the indictment did not "show an entirely different offense" than what was proved at trial.

A person commits aggravated assault with a deadly weapon if he: (1) intentionally or knowingly; (2) threatens imminent bodily injury to another; (3) using

or exhibiting a deadly weapon; (4) during the commission of the assault. *See* Tex. Penal Code § 22.02(b)(2)(B). Threats need not be verbal, but can be conveyed by action or conduct as well. *McGowan*, 664 S.W.2d at 347.

Here, the evidence shows that there was a non-verbal threat similar to the threat in *McGowan v. State.* In *McGowan*, the facts showed in one cause the victim was unaware of what struck her one time and was not threatened in any way by the appellant's knife, but in the other cause the victim in that case showed she was initially stabbed, saw the appellant holding the knife, and began begging appellant not to cut her, which was deemed sufficient to uphold that conviction. *Id.*, at 357-58. Similarly, in this case, the evidence showed that the Defendant repeatedly hit the victim with a 2X4 board. R.R. Vol. 4 P. 57. Even as the victim told the Defendant that the Defendant was hurting her, acknowledging the threat. R.R. Vol. 4 P. 57.

The Court of Appeals errs in concluding any time a variance involving a non-statutory allegation that describes an allowable unit of prosecution element of the offense, the variance is necessarily material. *See* Slip Op. pp.12-13. In this case, the trial court overruled defendant's request to include the phrase from the indictment in the jury charge, noting "I find that language to be superfluous. The State is required to prove up the elements of the offense charged." R.R. Vol. 5 pp. 56. This tracks the ruling the trial court made when it decided that the case would be tried without amendment to the indictment. R.R. Vol. 4 p. 16 ("Well, I – frankly, I don't understand why it's in there but I think it's superfluous. I think the State's burden is to prove the

elements of the offense as charged and that's my ruling"). No objection was made at trial to any lack of language differentiating between verbal and non-verbal threats. *See* R.R. Vol. 5 pp. 54-55. Indeed, when defendant moved for directed verdict, the motion was based on lack of evidence of *any* threat, defendant never complained that there may have been a threat, but it was only non-verbal. R.R. Vol. 5 pp. 76-77. Further, defendant's counsel made no argument that the threat was only non-verbal during closing arguments. *See* R.R. Vol. 5 pp. 104-18 (defense focused on arguing lack of threat particularly at 104-05). In addition, defendant made no distinction between verbal and non-verbal threats in either of his motions for new trial. C.R. Vol 1 pp. 126-28, 137-40. Defendant continued to claim throughout the trial that there was no threat, not that there was merely no verbal threat. This shows that there was no surprise in the proof at trial, just a dispute about whether any threat had been made; that dispute was ultimately decided by the Jury when it found the defendant guilty of aggravated assault by threat.

D. The Court of Appeals Erred in Determining The Defendant Lacked Notice of the Charge.

The Court of Appeals noted that even when a variance is material, reversal of a conviction relies on whether the variance prejudices the defendant's substantial rights. Slip Op. p 9; *Santana v. State*, 59 S.W.3d 187, 195 (Tex. Crim. App. 2001)(quoting *Gollihar*, 46 S.W.3d at 257). Whether the Defendant's substantial rights are prejudiced turns on whether the indictment, as written, informed the Defendant of the charge

against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under a deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime. *Gollihar*, 46 S.W.3d at 257. Here, there was notice sufficient to provide the Defendant to prepare an adequate defense at trial and as discussed above whether the Defendant is subject to further prosecution for the same charge is based off of the unit of prosecution, which is threatening while displaying and/or using the deadly weapon.

The Defendant received notice of the charge against him sufficient to allow preparing an adequate trial defense. The charge provided that the Defendant threatened the victim "by telling her that he was going to end her life and did use or exhibit a deadly weapon during the commission of the assault, to wit: a piece of wood." Slip. Op. P. 10. The State filed a Notice of Intention to Amend the Indictment about two and a half-months before trial. Slip Op. P. 5. This Amendment sought to delete the phrase "by telling her that he was going to end her life." Slip Op. P. 5. While the Trial Court agreed this phrase was superfluous, because the indictment had already been read to the jury the trial court decided to proceed on the original indictment, but noted that " the State's burden is to prove the elements of the offense as charged and that's my ruling." Slip Op. P. 5. But this Notice to Amend gave the defendant two and a half months to prepare a defense based on any threat; verbal, non-verbal, or a combination of both.

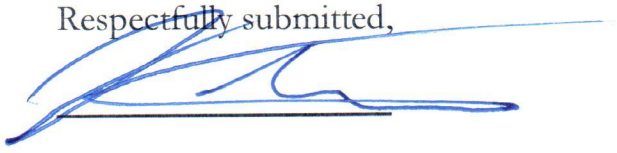
Indeed, throughout the trial the whole defense strategy depended on a lack of any threat being proven. When the Defendant moved for directed verdict it was on the basis that no threat of any kind was proven. R.R. Vol. 5 pp. 76-77. Likewise, when making jury arguments Defendant argued the State proved no threat of any kind. R.R. Vol. 5 pp. 104-05. This strategy is not affected whether the threat with the 2X4 included a verbal exclamation or not. It relies instead on the jury determining whether the victim's claim is truthful.

In conclusion, assuming that the Court of Appeals properly classified the variance as a non-statutory description of an allowable unit of prosecution, the variance was still not a material variance in this case. The difference between what was pled and what was proven does not impede on the defendant's substantial rights.

PRAYER

WHEREFORE, PREMISES CONSIDERED, State prays that the Court GRANT discretionary review, REVERSE the Court of Appeals Decision, and AFFIRM the conviction from the trial court. Alternatively, State prays that the Court GRANT discretionary review, REVERSE the Court of Appeals, and REMAND with instructions for further proceedings in line with this Court's decision.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Rule 9.4(i) of the Texas Rules of Appellate Procedure, Appellee's Brief contains 2,368 words, exclusive of the caption, identification of parties, statement regarding oral argument, table of content, index of authorities, statement of the case, statement of issues presented, procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

Kyle Nuttall

CERTIFICATE OF SERVICE

I certify that on September 8, 2020, a true and correct copy of Appellee's Brief is being or will be forwarded to Appellant's counsel by courtesy efile service to sharon@diazwright.com.

Kyle Nuttall

APPENDIX

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00759-CR

Jessie Lee Brooks, Jr., Appellant

v.

The State of Texas, Appellee

FROM THE 20TH DISTRICT COURT OF MILAM COUNTY
NO. CR25,688, THE HONORABLE JOHN YOUNGBLOOD, JUDGE PRESIDING

OPINION

Jessie Lee Brooks Jr. was convicted by a jury of aggravated assault with a deadly weapon. *See* Tex. Penal Code § 22.02(a)(2). The indictment alleged that Brooks threatened Lisa Grayson, his girlfriend, with imminent bodily injury "by telling her that he was going to end her life" while using or exhibiting a deadly weapon, to wit: a piece of wood. *See id.* §§ 22.01(a)(2), 22.02(a)(2). Arising out of the same set of facts, the State also indicted Brooks for family violence assault by impeding Grayson's breath or circulation, *see id.* § 22.01(a)(2), and the jury found him not guilty of that offense. The trial court entered judgment on the jury's verdict, assessing punishment at 30 years' confinement and requiring Brooks to pay several court costs and fees.

In four issues, Brooks contends that (1) the evidence was insufficient to support the jury's finding that he threatened Grayson, (2) the costs or fees are facially unconstitutional as violations of the separation of powers, (3) we should modify the trial court's Order to Withdraw

Funds from his Inmate Trust Account, and (4) we should modify the judgment to correct two clerical errors.

We reverse Brooks's conviction for aggravated assault and render a judgment of acquittal because there was a material variance between the indictment, which alleged that Brooks threatened Grayson "by telling her that he was going to end her life," and the evidence at trial, which showed a non-verbal threat of displaying a piece of wood, that resulted in insufficient evidence to support his conviction, and because the variance prejudiced his substantial rights.

BACKGROUND

Grayson lived with Brooks, her boyfriend, in Cameron, Texas. According to Grayson, as she was leaving for work one morning, Brooks attacked her. She believed that it started with Brooks feeling jealous over her receiving money from her child's father, so he "jumped on" her, as he had done several times before, and beat her. She testified that when she went to her car that morning, he beat her with "a two-by-four" wooden board that he retrieved from the house. As he "beat [her] with a board," she tried to protect herself with her arms, and he kept hitting her. She testified: he "hit[] me to the point it knocked my tooth—yes—I mean, my tooth came out, the partial on my tooth." And further: "When I fell and like hit—like grabbed both of his hands and he like literally choked me real hard." During her testimony, she said that she "didn't even talk to Brooks that morning" of the assault.

She also described prior assaults where Brooks "jumped" on her and beat her, including a prior assault over her children where he "grabbed me by my neck and slammed me to

the—to the passenger door. And then he like jumped me, and then—and then he like threatened me and just like—and he like jumped on me and cussing me and cussing me."

Grayson also testified that, after the assault that was the subject of this prosecution, she had bruises all over her body and her fingers "were busted." She sought treatment for her injuries at a Rockdale emergency room 15–20 minutes away, in order to hide from Brooks. She told the ER physician "that she was hit by her boyfriend with a two-by-four about the right arm, right forearm, [and] right hand." She also told the physician that she "had been choked the day before for about a minute," "had some chest-wall pain from some trauma," and "was hit the day before."

That night, Brooks reported to the Cameron police that Grayson had returned to his house, broke the house's windows, and went back to Rockdale. Officer James Sherer, of the Cameron Police Department, and a fellow officer offered to issue Grayson a trespass warning not to return to the house. Brooks agreed, so the officers contacted law enforcement in Rockdale to find her.

Law enforcement found Grayson in Rockdale during a traffic stop. She told Officer Sherer, who arrived later, that Brooks "struck [her] with a wooden board" and that she had not broken the windows out of the house. In addition, she told other officers at the traffic stop about being hit with the board. Several officers noticed bruising on her arm and hand, which she attributed to Brooks's attack with the board.

Grayson also told Officer Sherer that during her several-month relationship with Brooks she went to a hospital once in Temple, where, "they had to, like, bring me back to life" because Brooks had "choked the s— out of" her. She expressed that Brooks had a history of telling her that he would stop hitting her, and she believed him, but the abuse continued.

After the traffic stop ended, Grayson went to a Cameron police station and provided a voluntary handwritten statement, which was admitted into evidence at trial. She described the attack:

> The night went to car to get a Advil so Jessie lock me out the house I was tryin to come get back in house. he grad my neck start choching me so hard I couldn't Breath the he grad A Board start hitting me with it so hard I told Jessie that he was hurting me so he told me I need to Hit. So he kept Hittin me with the Board the After tha he start hittin my fingurs till they Stard Bleeding

Officer Clayton Domel of the Cameron Police Department reviewed the statement and later interviewed Grayson. She told him that there was an argument with Brooks during which Brooks "began to choke her." She said that she did not lose consciousness but "that she couldn't breathe and told him to stop." According to Officer Domel's description of Grayson's account, "at that point, [Brooks] quit choking her[,] and that's when he grabbed a piece of board, the two-by-four[,] from what she described[,] and began to strike her with it."

The State charged Brooks with two counts of assault in two separate indictments filed in two separate cause numbers. One charged him with intentionally or knowingly causing bodily injury to Grayson "by impeding the normal breathing or circulation of the blood . . . by applying pressure with hands to [her] throat and neck." The other charged him with intentionally or knowingly threatening her with imminent bodily injury "by telling her that he was going to end her life, and [he] did use or exhibit a deadly weapon during the commission of the assault, to wit: a piece of wood."

The cases proceeded to trial. A jury was empaneled; the State read both indictments to the jury verbatim; and Brooks pleaded not guilty to both offenses. The following day, before opening statements, the court addressed an issue "with regard to an amendment of

the indictment." The record reflects that about two and a half months before trial, the State filed a Notice of Intention to Amend the Indictment, in which it sought to amend the assault-by-threat indictment by, among other things, deleting the phrase "by telling her that he was going to end her life." The parties disputed whether the indictment had been amended by the notice, which had not been acted upon by the court. Ultimately, the trial court explained that trial would proceed on the original indictment as presented to the jury, implicitly denying the State's request to amend the indictment. While the judge seemed to agree with the State's argument that the phrase that it sought to delete was superfluous—remarking, "Well, I—frankly, I don't understand why it's in there but I think it's superfluous"—he stated that "the State's burden is to prove the elements of the offense as charged and that's my ruling."

The jury charge for aggravated assault by threat contained no instructions relating to the verbal threat contained in the indictment. In the abstract portion of the charge, the court defined "intentionally threaten another with imminent bodily injury" and "knowingly threaten another with imminent bodily injury" without reference to whether the threatening conduct was verbal or non-verbal. And, over Brooks's objection, the application paragraphs omitted the phrase "by telling her that he was going to end her life."[1] The court simply instructed the jury to find Brooks guilty if the State had proved beyond a reasonable doubt the three elements that

1. the defendant . . . threatened imminent bodily injury to [Grayson];
2. the defendant did this –
   a. intentionally; or
   b. knowingly; and

[1] In response to Brooks's objection that the phrase was "descriptive of the threat" and should be in the jury charge because it had been read to the jury, the trial court said, "And as I was saying, I find that language to be superfluous. The State is required to prove up the elements of the offense charged, and so I will overrule the objection at this time."

3. the defendant, during the alleged assault, used or exhibited a deadly weapon, to wit: a piece of wood.

The jury acquitted Brooks of family violence assault by strangulation but found him guilty of aggravated assault by threat. This appeal followed.

DISCUSSION

I. Material Variance Between Indictment's Allegation of Verbal Threat and Lack of Proof at Trial of Any Verbal Threat

In his first issue, Brooks contends that the evidence was insufficient because the State failed to prove the "threatens" element of assault as it was charged in the indictment. *See* Tex. Penal Code §§ 22.01(a)(2), 22.02(a).

A. Applicable law and standard of review

A person commits aggravated assault if the person "commits assault as defined in Sec. 22.01 and the person: . . . uses or exhibits a deadly weapon during the commission of the assault." *Id.* § 22.02(a)(2). A person commits assault if the person "intentionally or knowingly threatens another with imminent bodily injury." *Id.* § 22.01(a)(2). "Assault by threat requires only fear of imminent bodily injury and does not require a finding of actual bodily injury." *Dolkart v. State*, 197 S.W.3d 887, 893 (Tex. App.—Dallas 2006, pet. ref'd). The offense "is conduct-oriented, focusing upon the act of making a threat, regardless of any result that threat might cause." *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008). It is thus a "nature of conduct" offense, not a "result of conduct" offense. *See id.*; *see also id.* at 543 (Price, J., concurring) ("[T]here are the 'bodily injury' and 'physical contact' theories of simple assault, which are result-of-conduct theories of the offense, and then there is the 'threat-of-imminent-bodily injury' theory, which is a nature-of-conduct theory of the offense.").

A threat need not be verbal; a person may communicate a threat by action or conduct. *McGowan v. State*, 664 S.W.2d 355, 347 (Tex. Crim. App. 1984); *Donoho v. State*, 39 S.W.3d 324, 329 (Tex. App.—Fort Worth 2001, pet. ref'd). The "display of a deadly weapon of and within itself constitutes a threat of the required imminent harm." *Robinson v. State*, 596 S.W.2d 130, 133 n.7 (Tex. Crim. App. 1980); *Mitchell v. State*, 546 S.W.3d 780, 787 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

When reviewing the sufficiency of the evidence, "evidence is considered sufficient to support a conviction when, after considering all of the evidence in the light most favorable to the prosecution, a reviewing court concludes that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Hernandez v. State*, 556 S.W.3d 308, 315 (Tex. Crim. App. 2017).[2] The "essential elements of the offense" are "the elements of the offense as defined by the hypothetically correct jury charge *for the case*." *Id.* at 315 (quoting *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012)). "[A] hypothetically correct jury charge reflects the governing law, the indictment, the State's burden of proof and theories of liability, and an adequate description of the offense for the particular case." *Id.* It includes the statutory elements of the offense as modified by the indictment. *See id.* at 312–13; *Johnson*, 364 S.W.3d at 294.

There are sometimes "variances between allegations in the indictment and the State's proof at trial." *Hernandez*, 556 S.W.3d at 312. "[O]nly material variances will affect the hypothetically correct jury charge." *Id.* "[A]llegations that give rise to immaterial variances"

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[2] All citations to *Hernandez* are to the Court's opinion on original submission, which the Court affirmed on rehearing. *See Hernandez v. State*, 556 S.W.3d 308, 331 (Tex. Crim. App. 2018) (op. on reh'g) ("We affirm our original opinion reversing the judgment of the court of appeals, and we reject Hernandez's arguments on rehearing for the reasons stated herein.").

need not be "incorporate[d]" into the hypothetically correct jury charge for the case. *Johnson*, 364 S.W.3d at 294.

Two types of variances can be material. *See Hernandez*, 556 S.W.3d at 313–14; *Johnson*, 364 S.W.3d at 294–95. "The first type of variance occurs when the State's proof deviates from the *statutory* theory of the offense as alleged in the indictment; the State may not plead one specific statutory theory but then prove another." *Hernandez*, 556 S.W.3d at 313 (citing *Johnson*, 364 S.W.3d at 294). This type of variance is always material. *Id.* The second type of variance is a "non-statutory allegation that is descriptive of the offense in some way." *Id.* at 313–14 (citing *Johnson*, 364 S.W.3d at 294). Whether this type is material "depend[s] upon whether it would result in conviction for a different offense than what the State alleged." *Id.* at 314. If the variance "converts the offense proven at trial into a different offense than what was pled in the charging instrument," then it is material. *Id.* at 316.

The key to identifying different offenses is pinpointing the "allowable unit of prosecution" for each offense. *See id.*; *Johnson*, 364 S.W.3d at 295–96. A statute's allowable unit of prosecution is the "distinguishable discrete act that is a separate violation of the statute." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (quoting *Ex parte Cavazos*, 203 S.W.3d 333, 336 (Tex. Crim. App. 2006)). "Absent an explicit statement that 'the allowable unit of prosecution shall be such-and-such,' the best indicator of legislative intent regarding the unit of prosecution is the gravamen or focus of the offense." *Id.* at 630 (quoting *Jones v. State*, 323 S.W.3d 885, 889 (Tex. Crim. App. 2010)).

Because the assault statute establishes separate and distinct assaultive crimes, "[t]he gravamen of the offense of aggravated assault is the specific type of assault defined in Section 22.01." *See Landrian*, 268 S.W.3d at 536–37. Aggravated assault with the underlying

crime of assault causing bodily injury is a "result of conduct" offense; aggravated assault with the underlying crime of assault by threat is a "nature of conduct" offense. *Id.* at 540. For "nature of conduct" offenses, "different types of conduct are considered to be separate offenses." *Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010). The focus is on "the specific criminal act." *See Young v. State*, 341 S.W.3d 417, 424 (Tex. Crim. App. 2011). By contrast, because assault by causing bodily injury is result-oriented, "[h]ow that serious bodily injury was caused does not 'help define the allowable unit of prosecution for this type of aggravated assault offense, so'" a variance relating to how the actor caused the assault injury "cannot be material." *See Hernandez*, 556 S.W.3d at 314 (citing *Johnson*, 364 S.W.3d at 296–98); *cf. Johnson*, 364 S.W.3d at 298 ("'Stabbing with a knife' and 'bludgeoning with a baseball bat' are two possible ways of murdering Dangerous Dan, but they do not constitute separate offenses. These methods of committing murder do describe an element of the offense: the element of causation. But murder is a result-of-conduct crime. What caused the victim's death is not the focus or gravamen of the offense; the focus or gravamen is that the victim was killed. Variances such as this can never be material because such a variance can never show an 'entirely different offense' than what was alleged.").

In addition to materiality, reversal of a conviction for a variance depends on whether the variance prejudices the defendant's "substantial rights." *Santana v. State*, 59 S.W.3d 187, 195 (Tex. Crim. App. 2001) (quoting *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001)). Prejudice to the defendant's substantial rights turns on "whether the indictment, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime." *Id.* (quoting

Gollihar, 46 S.W.3d at 257). "[A] conviction that contains a material variance that fails to give the defendant sufficient notice or would not bar a second prosecution for the same [offense] requires reversal, even when the evidence is otherwise legally sufficient to support the conviction." *Byrd v. State*, 336 S.W.3d 242, 248 (Tex. Crim. App. 2011).

B. "Nature of conduct" of a verbal threat differs materially from "nature of conduct" of a non-verbal threat

With these principles in mind, we turn to Brooks's arguments under his first issue. He points out that the indictment charged him with threatening Grayson "by telling her that he was going to end her life, and [he] did use or exhibit a deadly weapon during the commission of the assault, to wit: a piece of wood." He concedes that the State need not have proven the exact words of the verbal threat in the indictment, but he argues that it had to prove "a *verbal* threat" of some kind, instead of only non-verbal threats. He says that "assault (and thus aggravated assault) by threat is a 'conduct-oriented offense', . . . meaning that [he] could be charged with as many instances of aggravated assault by threat as there were types of threats made."

We agree. Assault by threat, because it is a "nature of conduct" offense, centers on the specific criminal act alleged. *See Young*, 341 S.W.3d at 424; *Garfias v. State*, 424 S.W.3d 54, 60–61 (Tex. Crim. App. 2014); *Gillette v. State*, 444 S.W.3d 713, 730 (Tex. App—Corpus Christi–Edinburg 2014, no pet.); *see also Stevenson v. State*, 499 S.W.3d 842, 850 (Tex. Crim. App. 2016) ("A nature-of-conduct crime's focus is the conduct and the different types of conduct are considered separate offenses."). Therefore if Brooks threatened Grayson by displaying the piece of wood and saying nothing, that "of and within itself constitutes a threat of the required imminent harm." *See Robinson*, 596 S.W.2d at 133 n.7; *Mitchell*, 546 S.W.3d at 787. Such a non-verbal threat—an act different from a verbal threat to end Grayson's life—would constitute

a "distinguishable discrete act" that would separately violate the assault statute. *See Harris*, 359 S.W.3d at 629 (quoting *Ex parte Cavazos*, 203 S.W.3d at 336). In other words, a verbal threat would be "a different offense" from a non-verbal one—each act is a separate and distinct act of threatening. *See Hernandez*, 556 S.W.3d at 316. Although the verbal or non-verbal character of a threat "is not an element of the offense" proscribed by the assault statute, it is "a non-statutory description of the statutory, gravamen element of" the threatening conduct. *See Johnson*, 364 S.W.3d at 297–98 (citing *Byrd*, 336 S.W.3d at 251–52).

The hypothetically correct jury charge for Brooks's case, because of the indictment's allegation of threatening Grayson "by telling her that he was going to end her life," requires proof of a verbal threat. *See Hernandez*, 556 S.W.3d at 312–13; *Johnson*, 364 S.W.3d at 294. The only evidence suggestive of a verbal threat in this case was Grayson's written statement for the police.[3] In it, she wrote that, during the assault, Brooks "told me I need to [h]it." She never described any other statement that Brooks allegedly made, and the State offered no evidence of any other alleged verbal threat. We conclude that no rational juror could discern a threat in the statement here, "he told me I need to [h]it."

The variance between the verbal threat alleged in the indictment and the proof at trial of a non-verbal threat of displaying a piece of wood constitutes a non-statutory, material variance. *See Hernandez*, 556 S.W.3d at 313–14; *Johnson*, 364 S.W.3d at 294–96. Thus, there was insufficient evidence to support the required finding of the verbal threat alleged. *See Hernandez*, 556 S.W.3d at 315; *see also Byrd*, 336 S.W.3d at 247 ("A variance of this type is

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[3] Grayson testified about another instance when Brooks threatened her—she even used the word "threatened" in her testimony—but her testimony made clear that she was referring to an occasion before the one charged in the indictment.

actually a failure of proof because the indictment sets out one distinct offense, but the proof shows an entirely different offense.").

The State counters that the variance here is immaterial, like the ones in *Johnson* and *Marinos v. State*, 186 S.W.3d 167 (Tex. App.—Austin 2006, pet. ref'd). But in *Johnson*, the offense at issue was assault by causing bodily injury, not assault by threat. *See* 364 S.W.3d at 298. For assault by causing bodily injury, "[w]hat caused the victim's injury is not the focus or gravamen of th[e] offense." *Id.* Because that type of assault is a "result of conduct" offense, its gravamen is "the victim and the bodily injury that was inflicted." *Id.* Here, we have a different offense—the "nature of conduct" offense of assault by threat. *See Landrian*, 268 S.W.3d at 536; *id.* at 543 (Price, J., concurring). And in *Marinos*, this Court recognized that the indictment contained no allegation of a verbal threat: "Neither the indictment nor the charge required a finding that appellant verbally threatened the complainant, although there is ample evidence that he did so." 186 S.W.3d at 176 n.4. The opposite is true here. First, Brooks's indictment *did* contain an allegation of a verbal threat and thus required proof of a verbal threat. Second, no evidence demonstrated a verbal threat.

Having concluded that a material variance exists, we next must determine whether the variance between the indictment's allegation of a verbal threat and the evidence of a non-verbal one prejudiced Brooks's substantial rights. It did so if it did not give him sufficient notice of the charge against him and would subject him to further prosecution for this assault against Grayson. *See Byrd*, 336 S.W.3d at 248; *Santana*, 59 S.W.3d at 195.

As for notice, we conclude that the indictment failed to give Brooks sufficient notice of any charge against him of a non-verbal threat. In response to the indictment, Brooks presented a defense centered around the absence of a verbal threat. In opening statement, he

characterized the interaction between Brooks and Grayson as him kicking her out of the house and her getting angry in response, casting doubt about whether Brooks made any threat. His cross-examination of the State's witnesses, including Grayson, emphasized the lack of a verbal threat. During the charge conference, counsel argued that the jury charge needed to include instructions about the indicted verbal threat. He further argued that the charge should direct the jury to acquit because "[t]here have been zero statements with regard to a threat" in evidence. Counsel also moved for a directed verdict on the same basis. Finally, he argued to the jury that "words mean things" and that proof of causing bodily injury to Grayson did not constitute proof of a threat because the words "cause injury" and "threaten" are different.

Furthermore, the kind of threat alleged—a verbal threat—differed from a non-verbal threat. The record reflects that Brooks defended against the lack of any verbal threat. We conclude that the notice factor points to prejudice to Brooks's substantial rights. *See Byrd*, 336 S.W.3d at 248; *Santana*, 59 S.W.3d at 195.

Under the second factor, the indictment for a verbal threat leaves open the possibility of a future indictment for a non-verbal one. The two, as we have concluded, constitute different assault-by-threat offenses. *See Hernandez*, 556 S.W.3d at 314. Thus, this factor points to prejudice to Brooks's substantial rights even if "the evidence [wa]s otherwise legally sufficient to support the conviction" for an assault by a non-verbal threat. *See Byrd*, 336 S.W.3d at 248.

For all these reasons, we hold that the variance between the indictment allegation of Brooks's threat "by telling [Grayson] that he was going to end her life" and the evidence at trial of a non-verbal threat of displaying a piece of wood was a material variance that prejudiced Brooks's substantial rights and resulted in insufficient evidence to support his conviction.

See Hernandez, 556 S.W.3d at 315–16. We thus sustain Brooks's first issue and reverse his conviction for aggravated assault.

II. No Potential Lesser Included Offense Necessarily Found by the Jury

Because we hold the evidence insufficient to support Brooks's conviction for aggravated assault by threat as it was charged here, we must "decid[e] whether to reform the judgment to reflect a conviction for a lesser-included offense" before we may render a judgment of acquittal. *Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014).

Our "authority to reform a judgment of conviction is limited to lesser-included offenses of the offense of conviction." *Lang v. State*, 586 S.W.3d 125, 130 (Tex. App.—Austin 2019, pet. granted). A "necessar[y] part of the analysis" is "whether the offense for which a reformed judgment of conviction is sought is a lesser-included offense of the convicted offense." *Id.* at 130 n.2. This is so because neither this Court nor the trial court has "jurisdiction to convict a defendant of an offense not charged in the charging instrument unless that offense is a lesser-included offense *of the crime charged*." *See id.* (emphasis added). To identify potential lesser included offenses, "[w]e do not consider the evidence that was presented at trial; rather, we consider only the statutory elements of aggravated assault with a deadly weapon as they were modified by the particular allegations in the indictment." *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011).

Brooks identifies three potential lesser included offenses: attempted aggravated assault by threat with a deadly weapon, misdemeanor deadly conduct, and simple assault by threat. We have found no other potential lesser included offenses applicable to "the statutory

elements of aggravated assault with a deadly weapon as they were modified by the particular allegations in the indictment" here. *See id.*

In analyzing judgment reformation, we

> must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?

Thornton, 425 S.W.3d at 300. If we answer either of these "no," we are "not authorized to reform the judgment" to reflect a conviction for the lesser included offense. *Id.* "But if the answers to both are yes, [we are] authorized—indeed required—to avoid the 'unjust' result of an outright acquittal." *Id.*

To reform to the lesser included offense of attempted aggravated assault by threat, the evidence must show that Brooks, "with specific intent to commit" aggravated assault by threat with a deadly weapon, "d[id] an act amounting to more than mere preparation that tend[ed] but fail[ed] to effect the commission of" that offense. *See* Tex. Penal Code § 15.01(a). "[T]o be guilty of criminal attempt, it is not necessary that the accused commit every act short of actual commission of the intended offense." *Come v. State*, 82 S.W.3d 486, 489 (Tex. App.—Austin 2002, no pet.). "There is necessarily a gray area between conduct that is clearly no more than mere preparation and conduct that constitutes the last proximate act prior to actual commission of the offense." *Id.* "Whether conduct falling in that gray area amounts to more than mere preparation must be determined on a case-by-case basis." *Id.* No evidence shows conduct by Brooks that tended but failed to effect a verbal threat against Grayson beyond merely preparing to make a verbal threat. The only evidence of a verbal statement by Brooks was Grayson's

written statement that Brooks "told [her] I need to [h]it." We cannot discern from this statement any step beyond mere preparation toward verbally threatening her. No other testimony or exhibit suggests a step toward a verbal threat on the occasion in question. We thus conclude that the evidence is insufficient to support reformation to the lesser included offense of attempted aggravated assault by threat with a deadly weapon.

As for misdemeanor deadly conduct, that offense requires evidence that Brooks recklessly engaged in conduct that placed Grayson in imminent danger of serious bodily injury. *See* Tex. Penal Code § 22.05(a); *Dixon v. State*, 358 S.W.3d 250, 256–57 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). When an indictment alleges that the defendant intentionally or knowingly threatened to cause imminent bodily injury while using or exhibiting a deadly weapon, deadly conduct is established by proof of the same or less than all the facts needed to establish aggravated assault. *See Guzman v. State*, 188 S.W.3d 185, 190 n.9 (Tex. Crim. App. 2006); *Dixon*, 358 S.W.3d at 256–57.

We are bound by the indictment's allegations when determining whether misdemeanor deadly conduct is a potential lesser included offense. *See Rice*, 333 S.W.3d at 145 ("We do not consider the evidence that was presented at trial; rather, we consider only the statutory elements of aggravated assault with a deadly weapon as they were modified by the particular allegations in the indictment."); *Lang*, 586 S.W.3d at 130 n.2 (concluding that this Court has no "jurisdiction to convict a defendant of an offense not charged in the charging instrument unless that offense is a lesser-included offense *of the crime charged*" (emphasis added)). The indictment here alleged a verbal threat.

Accordingly, we must answer (1) whether, in convicting Brooks for aggravated assault by threat and with a deadly weapon, the jury must have necessarily found every element

necessary to convict him of misdemeanor deadly conduct and (2) whether sufficient evidence supports the necessary findings. *See Thornton*, 425 S.W.3d at 300. We answer "no" to the second question because only a verbal threat was charged. And as we concluded above, no rational juror could have found a verbal threat from the evidence. Thus, because there is insufficient evidence of the kind of threat charged, no evidence establishes the required combination of a threat plus the use or exhibition of a deadly weapon that would establish misdemeanor deadly conduct's elements. *See Guzman*, 188 S.W.3d at 190 n.9 ("proof of threatening another with imminent bodily injury by the use of a deadly weapon constitutes proof of engaging in conduct that places another in imminent danger of serious bodily injury," for misdemeanor deadly conduct); *Dixon*, 358 S.W.3d at 256–57 (same). Misdemeanor deadly conduct is not a potential lesser included offense of the aggravated assault by threat charged here. *See Thornton*, 425 S.W.3d at 300 ("If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment.").

As for simple assault by threat, we have already concluded that the evidence of a non-verbal threat is insufficient to support a conviction for a charge based on a verbal threat. Thus, we cannot reform the judgment to simple assault by threat.

We do not have the authority to reform the judgment of conviction here to any lesser included offense. We therefore must reverse the judgment of conviction and render a judgment of acquittal. *See id.* at 299–300; *Lang*, 586 S.W.3d at 136. Because of this disposition, we need not reach Brooks's remaining issues. *See* Tex. R. App. P. 47.1.

CONCLUSION

We reverse the judgment of conviction and render a judgment of acquittal.

Chari L. Kelly, Justice

Before Justices Goodwin, Baker, and Kelly

Reversed and Acquittal Rendered

Filed: July 3, 2020

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